

BG APR 27 2004

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION
SECURITIES LITIGATION

Civil Action No. H-01-3624
(Consolidated)

This Document Relates To:

MARK NEWBY, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

vs.

KENNETH LAY, et al.,

Defendants.

**MEMORANDUM OF DEFENDANT
CANADIAN IMPERIAL BANK OF COMMERCE
IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION
OF ORDER DISMISSING CLAIMS (DOCKET NO. 2048)**

INTRODUCTION^{1/}

On April 1, 2004, the Court entered an order (Docket No. 2048) granting a motion to dismiss filed by Canadian Imperial Bank of Commerce ("CIBC") and its subsidiary, CIBC World Markets,

^{1/} The same issues raised by plaintiffs' motion for reconsideration are currently before the Court on motions for reconsideration filed by Bank of America Corporation and Lehman Brothers Holding Inc. CIBC adopts the arguments made by Bank of America and Lehman Brothers with respect to those motions.

2108

with respect to all claims arising out of Enron's May 1999 Note Offering, on the ground that those claims were barred by the three-year statute of repose. Plaintiffs do not seek reconsideration of the Court's ruling with respect to the dismissal of CIBC World Markets, which was one of the underwriters for the May 1999 Note Offering. However, they contend that they should be allowed to pursue a control person claim against CIBC under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act even though they cannot pursue any claims against the alleged primary violator (CIBC World Markets).

Plaintiffs' motion for reconsideration should be denied. Plaintiffs contend that they should be allowed to proceed against CIBC under a control person theory because they pleaded control person claims in the Consolidated Complaint filed on April 8, 2002. But, as demonstrated below, that is simply not true: the Consolidated Complaint alleged that CIBC itself acted as an underwriter in the 1999 Note Offering; there was no claim that it controlled the entity that was the actual underwriter. Plaintiffs also argue, in the alternative, that their newly-filed control person claims against CIBC relate back to the filing of the Consolidated Complaint because they supposedly arise out of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15(c), Federal Rules of Civil Procedure. This argument should also be rejected because the First Amended Consolidated Complaint necessarily requires proof of entirely new factual elements — a primary violation by CIBC World Markets and control of its actions by CIBC — that were not raised by the initial complaint.

Finally, a separate and independent reason for denying plaintiffs' motion to reconsider is that plaintiffs should not be able to pursue control person claims when their claims against the alleged primary violator are barred as a matter of law.

BACKGROUND

In the Consolidated Complaint, filed on April 8, 2002, plaintiffs sought damages under both

Section 10(b) and Section 11 against a variety of defendants on behalf of purchasers of Enron notes in a May 1999 Note Offering. There was no mystery as to who the underwriters were for that Note Offering: they were clearly identified on the prospectus issued in connection with the Offering. Nevertheless, plaintiffs chose not to sue the underwriters, instead suing their parent companies, including CIBC. Nowhere in the Consolidated Complaint was there any suggestion that CIBC was being sued under a control person theory for alleged violations by CIBC World Markets of Section 11 or Section 10(b). Instead, plaintiffs alleged that CIBC itself had served as an underwriter for the May 1999 Note Offering and sought to hold it liable as an underwriter for an alleged primary violation of Section 11 and Section 10(b). Consolidated Compl. ¶ 723.

Plaintiffs chose to sue CIBC alone even though they *knew* that three-year statute of repose for claims arising out of the May 1999 Note Offering would soon expire, precluding them from bringing claims against any additional parties. In CIBC's motion to dismiss — which was filed 11 days before the statute of repose expired — CIBC argued that plaintiffs had sued the wrong entity, attaching a copy of the 1999 prospectus listing CIBC World Markets as an underwriter. *See* Ex. B to Docket No. 615. Still, plaintiffs did not seek leave to add CIBC World Markets as a defendant, nor did they argue in opposing CIBC's motion to dismiss that they were suing CIBC under a control person theory. Instead, plaintiffs denied that they had “sued the wrong party” and insisted that they had a right to pursue all of their claims against CIBC under Section 11 and Section 10(b) because they had alleged sufficient facts to show that CIBC was a direct participant in the alleged wrongdoing and therefore a primary violator. Pl. Resp. (Docket No. 849) at 3 n. 6.

When plaintiffs filed their First Amended Consolidated Complaint in May 2003, they abandoned their claim that CIBC was primarily liable for alleged misstatements in the May 1999 Note Offering. Their new theory was that CIBC World Markets was primarily liable as the underwriter and that CIBC was liable as a control person under Section 15 of the 1933 Act and

Section 20(a) of the 1934 Act. *See* 1st Am. Consol. Compl. ¶¶ 995.1, 1006, 1013. This Court dismissed plaintiffs' claims against CIBC World Markets because, even if the filing of the amended complaint related back to the date when plaintiffs first raised the possibility of adding the subsidiaries as defendants (in January 2003), their claims arising out of the May 1999 Note Offering were barred by the three-year statute of repose. 4/1/04 Order (Docket No. 2048) at 9. At the same time, the Court also dismissed plaintiffs' "derivative" control person claims against CIBC arising out of the May 1999 Note Offering. *Id.* It is the latter decision that plaintiffs have asked this Court to reconsider.

ARGUMENT

I. Plaintiffs' Control Person Claim Against CIBC Is A New Claim That Should Not Be Deemed To Relate Back To The Filing Of The Consolidated Complaint.

In their Motion for Reconsideration, plaintiffs argue that there was nothing new about the control person claims they asserted against CIBC in their First Amended Consolidated Complaint; plaintiffs contend that they first asserted those claims in their Consolidated Complaint, which was filed on April 8, 2002. This is nothing more than revisionist history. The Consolidated Complaint alleged that CIBC was an underwriter of the May 1999 Note Offering; nowhere in the complaint is there any suggestion that plaintiffs were seeking to hold CIBC liable under a control person theory. Indeed, such a theory would have been internally contradictory: CIBC could not be both the underwriter and the control person of the underwriter.

In any event, any ambiguity with respect to the nature of the claim that plaintiffs were making against CIBC was resolved when CIBC briefed its motion to dismiss. Plaintiffs could have responded to CIBC's motion by arguing that they had intended to plead a control person claim. But they did not do so, instead insisting that they were entitled to pursue CIBC as a primary violator. Under these circumstances, there is simply no basis for plaintiffs' claim that they sued CIBC from

the beginning under a control person theory.

Plaintiffs also argue that, even if their control person claim was new, it should be deemed to relate back to the filing of the Consolidated Complaint. In the briefing on the motions to reconsider filed by Bank of America and Lehman Brothers, plaintiffs have cited a number of cases holding that claims raising new theories relate back to the filing of the original complaint so long as they arise out of the same conduct, transactions or occurrences. Plaintiffs argue that this standard is met apparently because they are seeking to hold CIBC liable for the very same Note Offering that was the subject of the Consolidated Complaint.

Suing CIBC as a control person, rather than as a primary violator, however, adds a whole new factual layer to the case: plaintiffs must now prove not only that the May 1999 Note Offering contained material misstatements, but also that CIBC World Markets had the state of mind necessary to hold it liable for those misstatements and that CIBC controlled CIBC World Markets' conduct as an underwriter to such an extent that it can be held responsible for that conduct. These new factual issues make plaintiffs' new control person claim so fundamentally different from the original claim asserted against CIBC that it should not be deemed to relate back to the filing of the Consolidated Complaint. *See In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig.*, 467 F.Supp. 227, 260 (W.D. Tex. 1979) (intervenor's Section 11 claim did not relate back to the filing of a Section 10(b) claim because, *inter alia*, "the difference in the legal base of the claims [was] marked" and defendants "had no notice of the shift in the burden of proof and the elimination of the scienter requirement which section 11 entails").

Because the control person claims plaintiffs asserted against CIBC with respect to the May 1999 Note Offering were not made in the Consolidated Complaint and do not relate back to the filing of the Consolidated Complaint, those claims are barred by the three-year statute of repose, just as the claims against CIBC World Markets are barred.

II. Plaintiffs' Control Person Claims Against CIBC Arising Out Of The May 1999 Note Offering Are Barred Because The Primary Claims Against CIBC World Markets Are Barred.

It is well settled that control person liability “is secondary only and cannot exist in the absence of a primary violation.” *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 2004 WL 626721 at *22 (5th Cir. Mar. 31, 2004). The Court’s dismissal of plaintiffs’ claims against CIBC arising out of the May 1999 Note Offering was also proper because, once plaintiffs’ claims against the alleged primary violator were held to be barred by the statute of repose, whatever derivative claims plaintiffs asserted against CIBC necessarily failed as well. *See* 4/1/04 Order at 9.

Plaintiffs respond to this argument by pointing to case law holding that a plaintiff is not required to sue a primary violator in order to bring a complaint against a control person, so long as the claim against the control person is brought in a timely manner. But in this case, for all of the reasons outlined above, plaintiffs did not bring a control person claim against CIBC challenging the conduct of CIBC World Markets before the three-year statute of repose had expired. Instead, they waited until more than three years had passed to challenge CIBC’s World Markets’ conduct. Whatever the rule might be in the situation plaintiffs hypothesize — where a plaintiff makes a timely allegation of wrongful conduct against the alleged primary violator, but chooses to sue only the alleged control person — that rule should not apply here.

The three-year statute of repose creates an absolute cut-off date for claims arising out of the purchase or sale of securities. At the very least, plaintiffs had an obligation to challenge the propriety of CIBC World Markets’ conduct in connection with the May 1999 Note Offering by May 2002. Their failure to do so bars any claims plaintiffs could have asserted against CIBC World Markets; it should also bar any claims that plaintiffs could assert against CIBC that are based on CIBC World Markets’ conduct.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Reconsideration of this Court's April 1, 2004 Order dismissing claims against CIBC arising out of the May 1999 Note Offering should be denied.

Dated: April 27, 2004

Respectfully submitted,

By: Mark D. Manela

Mark D. Manela
Texas Bar No. 12894500
S.D. Bar No. 1821

700 Louisiana Street
Suite 3600
Houston, Texas 77002-2730
(713) 221-1651
(713) 224-6410 (Facsimile)
e-mail: cibc-newby@mayerbrownrowe.com

ATTORNEY IN CHARGE FOR
DEFENDANT CANADIAN IMPERIAL
BANK OF COMMERCE

OF COUNSEL:

MAYER, BROWN, ROWE & MAW LLP
700 Louisiana Street
Suite 3600
Houston, Texas 77002-2730

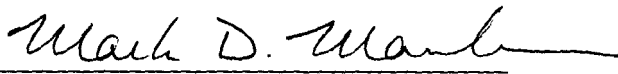
-and-

Alan N. Salpeter
Michele Odorizzi
T. Mark McLaughlin
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
(312) 701-7711 (Facsimile)
e-mail: cibc-newby@mayerbrownrowe.com

ATTORNEYS FOR DEFENDANT
CANADIAN IMPERIAL BANK OF
COMMERCE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on all counsel of record through www.esl3624.com pursuant to the Court's order regarding website service on this the 27th day of April, 2004.



Mark D. Manela